United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

ORIGINAL

76-7534

To Be Argued By
ROBERT SILAGI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

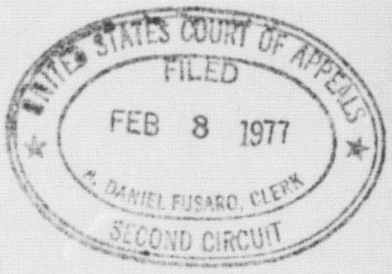
LOCAL UNION NO. 9644, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Plaintiff-Appellee,

-against-

N.J. NESMITH CONSTRUCTION CO., A New Jersey Corporation, also known as N.J. NESMITH,

Defendant-Appellant.



On Appeal From the United States District Court For the Southern District of New York

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BRIEF AND APPENDIX FOR PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7534

LOCAL UNION NO. 964, UNITED BOTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Plaintiff-Appellee

-against-

N.J. NESMITH CONSTRUCTION CO., A New Jersey Corporation, also known as N.J. NESMITH,

Defendant-Appellant.

On Appeal From the United States District Court For the Southern District of New York

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BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

Defendant-appellant, N.J. Nesmith Construction Co., a New Jersey Corporation also known as N.J. Nesmith, (hereinafter the Employer), appeals from the Memorandum and Order dated September 1, 1976, and Judgment entered September 30, 1976, of the Honorable Gerald L. Goettel,

United States District Judge for the Southern District of New York, confirming an arbitrator's award. Judge Goettel's memorandum opinion, which is set forth at page 1 of the Appendix annexed to this brief, is not officially reported. Plaintiff-appellee, Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, (hereinafter the Union) moved for summary judgment which was granted on the basis of a formal motion made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Questions Presented

(1) After a statutory notice of intention to arbitrate pursuant to New York Civil Practice Law and Rules, Section 7503(c) was properly served upon the Employer, and after failing to move for a stay of arbitration, and after unsuccessfully challenging the validity of a collective bargaining agreement in the arbitration hearing, may the Employer nevertheless attack the validity of said agreement in a court of law?

(2) Did the Employer's attempt to relitigate the validity of the contract raise any issue of fact which precluded the District Court from granting summary judgment?

(3) In accordance with the arbitration clause of the contract, may legal fees be awarded to the Union's counsel for his services rendered in connection with the action before the District Court?

The Union maintains that the District Court properly answered the first two questions in the negative and the third question in the affirmative.

Statement of the Case

On January 16, 1975, the parties executed a collective bargaining agreement which includes a provision to settle all disputes by arbitration (see Section 24 of the contract - Appendix 15). A dispute having arisen, on October 20, 1975, the Union served upon the Employer a

statutory notice of intention to arbitrate (Appendix 13). Under CPLR 7503(c) the Employer had twenty days in which to move to stay the arbitration upon the ground that "a valid contract was not made or has not been complied with". The Employer failed to avail itself of this opportunity. Instead, it invited the Union's auditor to conduct an examination of its books. Upon failure by the Employer to agree upon the amounts it owed, the Union requested the New York State Mediation Board to designate an arbitrator pursuant to Section 24 of the labor contract. Thereafter New York State Mediation Board appointed Max J. Miller, Esq., to hear and determine the dispute. On February 5, 1976, a hearing was held before Arbitrator Miller at which both parties appeared by counsel. Full opportunity was accorded to the parties to introduce evidence and to examine and cross-examine witnesses.

During the course of the arbitration hearing, the Employer's only witness, Norman J. Nesmith, testified that he conducted his business in corporate form, of which he was "sole owner". He admitted that N. Richard Nesmith, whose signature appeared on the contract, was his son, employee and supervisor, but insisted that the latter had no authority to bind the corporation. The Employer's witness

further contended that he was not aware that his son signed the contract until some ten months later. Upon cross-examination, Nesmith conceded that he had, in the intervening months, made at least four contributions to the Union's Fringe Benefits Funds (Pension, Welfare, Vacation and Supplementary Unemployment Benefits) and that accompanying each contribution, there had been an official union report form duly signed by himself (Appendix 16). At the foot of each report form there appeared the following legend:

> "By making this report, the above named company herewith agrees and acknowledges that it is bound by the Collective Bargaining Agreement in effect between the parties and all the trust agreements so in effect with respect to any fringe benefits funds of Local #964. In addition, it agrees to be bound by the arbitration clause of the said Collective Bargaining Agreement".

When confronted with his own signature, Nesmith, blandly asserted that the forms were prepared by his bookkeeper; that he had not read the legend quoted above; but he admitted that he had signed the checks which were forwarded to the Union along with the forms. Although maintaining that he was not bound by the contract, Nesmith conceded that he never took affirmative action to repudiate the contract signed by his son "without my authority" although he "always observed union standards"!

Upon all the evidence the arbitrator found that Nesmith's "good faith and credibility were seriously challenged and his position must be found to constitute a sham defense, of necessity requiring his testimony to be disregarded because the persuasive 'facts' realistically establish beyond a doubt that the Employer's procedural issue is without merit". Accordingly, the arbitrator upheld the Union's claims and issued an appropriate award.

The Union demanded compliance with the arbitrator's award and when compliance was refused moved the District Court to confirm the award. The Employer again attempted to challenge the validity of the contract based upon the same evidence submitted to the arbitrator. This attempt was rejected and on September 1, 1976, Judge Goettel granted summary judgment in favor of the Union. Although, Judge Goettel left the issue of counsel fees open, upon the submission of an affidavit of services, he granted counsel fees, including disbursements, in the sum of $693.08, for legal services rendered on behalf of the Union in its action in the District Court.

Argument

Point I

AN ATTACK UPON THE VALIDITY OF A CONTRACT IS A THRESHHOLD QUESTION WHICH MUST BE LITIGATED IN ADVANCE OF ARBITRATION.

A. The New York Law.

It is the well settled law in New York that an attack upon the validity of a contract must be raised by a proceeding to stay the arbitration pursuant to CPLR 7503(c). See, e.g., Matter of Hesslein & Co. v. Greenfield,281 N.Y.26, 31 (1939); Finsilver, Still & Moss v. Goldberg, M. & Co., 253 N.Y.382 (1930); Langemyr v. Campbell, 23 A.D.2d 371 (2nd Dept., 1965). CPLR provides, in pertinent part that:

> "An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded [from objecting that a valid agreement was not made]".

In this connection, the Appellate Division, Second Department stated in Langemyr v. Campbell, supra, at 373,

> "The section itself is quite plain, but a practice commentary to the section makes the effect unmistakable: 'Proper service of a proper notice of intention to arbitrate will preclude the raising of threshhold questions [making of a valid agreement] except upon an application to stay arbitration made within ten [now twenty] days after service thereof (Book 7B, McKinney's Cons. Laws of N.Y. Civil Practice Law and Rules, pp.488-489)."

If a party were allowed to raise a pre-arbitration question at any time after the twenty day period allowed by statute, the opposing party could never rely upon the conclu-

siveness of the arbitration award granted him.

The brief of the Employer relies upon Hesslein & Co., Inc. v. Greenfield, supra, as authority for the proposition that a contract not signed presents a clear question of fact which should have been tried by the District Court. While it is true that in Hesslein the contract was not signed by respondent, however, respondent was not personally served with a notice of intention to arbitrate. Since personal service was the manner prescribed at that time by law, the Court of Appeals held that there had been effectively no service of a notice of intention to arbitrate and consequently it was proper to raise the issue of the existence of the contract upon the motion to confirm the award. The Court stated, at page 31:

> "If a notice shall have been personally served upon a party of an intention to conduct arbitration, pursuant to the provisions of a contract, then the issue of the existence or the making of a contract may be raised only by a motion for a stay of arbitration." (emphasis supplied)

The Union's notice of intention to arbitrate was proper both in form and in manner of service. Indeed, the Employer never raised any issue with regard to the notice. It is, therefore, apparent that the Employer misconstrues Hesslein.

B. The federal law.

With minor variations Arbitration Law §4, (9 U.S.C. §4) embodies the same statutory scheme as CPLR 7503. As shown above, the New York law allows a party to commence arbitration by serving a 20 day notice of intention to arbitrate. Under the federal law, a party may petition the district court upon five days' notice in writing. A respondent who contests the making of the agreement or the failure to comply therewith, must proceed to trial in the district court. If it is found that no agreement in writing was made, then the proceeding must be dismissed. If, however, the court finds that an agreement for arbitration was made in writing, then "the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof". Both federal and New York law are in agreement that raising an issue as to the validity of a contract is a threshhold question which must be decided by a court in advance of arbitration. See Reeves v. Tarvizian, 351 F.2d 889, 891 (st Cir., 1965); Boston and Maine Corp. v. Illinois Central Railroad Corp., 274 F. Supp. 257, 260 (S.D.N.Y.), aff'd., 396 F.2d 425 (2d Cir. 1968). See also Lerma v. Allstate Insurance Company, 301 F. Supp. 361, 363-64 (N.D. Ind., 1968); Bernhardt v. Polygraphic Co. of America, 122 F. Supp. 733, 734 (D. Vt. 1954), rev'd,

218 F. 2d 948 (2d Cir., 1955), aff'd, 350 U.S. 198 (1956).

Having failed to make the preliminary motion to stay the arbitration, the Employer is now precluded from attacking the contract on the motion to confirm the arbitrator's award.

Point II

THE EMPLOYER'S ATTEMPT TO RELITIGATE THE VALIDITY OF THE CONTRACT IN THE DISTRICT COURT RAISED NO GENUINE ISSUE OF MATERIAL FACT, HENCE SUMMARY JUDGMENT CONFIRMING THE ARBITRATION AWARD WAS PROPER.

In the District Court, the Employer repeated the same arguments presented to the arbitrator about the unsigned contract. The Employer's brief to this Court neglects to mention the signatures on the reports. Assuming that the contract was not properly signed, such defect, if any, was cured by the reports. Under these circumstances there was no ambiguity to resolve. The Employer's bare assertion, no matter how persistently repeated, did not alter the basic fact that it had agreed to be bound by the labor contract. Since the Employer's affidavits raised no genuine triable issue of material fact, summary judgment was proper. Cf. Petroleo Brasileiro, S. A., Petrobas v. Ameropan Oil Corp., 372 F. Supp. 503 (E.D.N.Y., 1974); see Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1324 (F.D.N.Y., 1970) "The purpose of summary judgment is to screen out the sham issues and

'to discover whether one side has no real support for its version of the facts'". aff'd 451 F. 2d 593 (2d Cir. 1971). cert. denied 408 U.S. 922 (1972).

In accordance with Local Rule 9 (g) the Union filed its statement of material facts. The Employer, however, failed to file its own counter-statement. Item 5 on the Union's statement was to the effect that at the arbitration hearing the Employer's defense consisted of the claim that there was no valid agreement between the parties. The Employer seizes upon this statement as an admission that there is a triable issue of fact, conveniently neglecting to mention item 6 of the Union's statement which said, "On February 9, 1976, the arbitrator issued his award in which he found, among other things, that defendant's defense was a 'sham'." On procedural grounds, alone, summary judgment was properly granted; see United States v. Tinghino 396 F. Supp. 743 (E.D.N.Y., 1975).

An arbitration award may be vacated only on certain narrow grounds which relate primarily to the fairness of the hearing and of the arbitrators themselves, and to the power of the arbitrators as contractually defined. Boston and Maine Corp., v. Illinois Central Railroad Co., supra. Thus,corruption, fraud, misconduct in procuring the award and partiality or corruption of the arbitrators are grounds for setting an award aside. Federal Arbitration Act 9 U.S.C. §10, see also CPLR 7511 (b). The Employer advances no statutory reason but argues that the

arbitrator lacked authority to judge the validity of the contract because it was never signed by an authorized party and therefore void. (See Employer's brief, point II.)

The short answer to the Employer's argument is that it participated in the arbitration proceeding. Submission to arbitration ratifies the power of the arbitrator to deal with the matters submitted. Boston and Maine Corp., v. Illinois Central Railroad Co., supra., 260. The Employer admits attending the hearing but asserts that its only reason was to voice the opinion that it was not subject to the contract (Employer's brief, p. 4.) Regardless of its intent, the Employer participated fully in said hearing. Moreover, New York law does not permit "special appearances". Under the former Civil Practice Act special appearances were allowed but they were eliminated by CPLR. The stated objectives of the draftmen of the Advisory Committee includes the following statement:

> "4. To eliminate the special appearance and thereby place objections involving the court's jurisdiction over persons and things on the same level as other preliminary objections." (New York Civil Practice, Weinstein, Korn & Miller, Vol. 1, ¶301.06)

Consequently, objections to an arbitrator's jurisdiction, i.e., an attack upon the validity of the contract which grants the arbitrator power to act, must be dealt with as a preliminary objection, that is, by a motion to stay arbitration under CPLR 7503(c).

Nor does the Employer's insistence that the contract was void because never signed by an authorized party prevent the arbitrator from finding to the contrary. Surely the undisputed signature of the Employer's president and "sole owner" on at least four reports explicitly stating his consent to be bound by the labor contract and its arbitration provision cannot be sloughed over with the airy excuse that he never read them. The law does not relieve a person merely because he failed to read the document which he executed. Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc., 30 A.D. 2d 529 (1st Dept., 1968). In addition to signing the aforesaid documents, the Employer gave all indicia of wanting to be bound by the contract. For example, it hired Union carpenters, paid them Union rates, made substantial contributions to the Union Fringe Benefits Funds and even allowed an audit of its books by the Union's accountant! For at least ten months, the Employer enjoyed the advantages of a Union shop therefore it is no more than right that it adhere to the Union contract. Taking all these factors into consideration, the arbitrator had no choice but to find that there was no merit to the Employer's defense.

Therefore, we are forced to the conclusion that the Employer's argument is addressed not so much to the arbitrator's lack of jurisdiction but to the exercise of his jurisdiction adversely to the Employer. This is hardly a serious ground

for avoiding summary judgment.

Point III

THE EMPLOYER MUST PAY FOR ALL COSTS OF THE ARBITRATION AND ALL CONSEQUENTIAL LEGAL EXPENSES.

Section 24 (B) of the contract states, in pertinent part:

> "Costs of the arbitration including the arbitrator, accounting, legal and court fees shall be paid by the party losing the arbitration, unless otherwise mutually agreed by the parties. If there is a question as to who 'loses' the arbitration, the decision of the arbitrator shall be binding."

The theory behind the aforesaid agreement is two-fold. First, it insures that arbitration will not be used as a frivolous device to harass either party. Second, it is designed to make whole the party who prevails. In a typical case, such as the one at bar, the Union seeks to redress the rights which its members lost as the result of the Employer's violation of the contract. The arbitrator restored wages and fringe benefits to the members. The Union bore the expense but the money recovered flows to the members and to their accounts in the Fringe Benefits Funds. The legal fees incurred by the Union in prosecuting the arbitration are out-of-pocket expenses which it must recover in order to be made whole. Similarly, any legal expenses incurred by the Union in confirming the arbitrator's award or upon appeal from the judgment of the District Court must also be reimbursed if the

Union is to be made whole. The Union, of course, makes no profit, but by the same token it should suffer no loss.

The arbitrator awarded counsel fees to the Union's attorney for legal services rendered in connection with the arbitration. The District Court likewise correctly awarded counsel fees for legal services rendered in connection with the action to confirm the arbitrator's award and the motion for summary judgment. (See Judge Goettel's Judgment, Appendix 10).

It is respectfully requested that this Court permit the Union's counsel to submit an affidavit of services for legal services rendered in connection with this appeal, and that upon affirming the judgment of the District Court an appropriate sum be added for legal services rendered in this Court.

Conclusion

The Employer agreed to be bound by the labor contract, the benefits of which it enjoyed for ten months. It is fair and equitable that the Employer abide by its obligations under said contract. The arbitrator properly found that the Employer's defense was a sham. Upon the motion for summary judgment to confirm the arbitration award the Employer failed to raise any genuine issue of material fact. Therefore, tne judgment of the District Court granting summary judgment and confirming the arbitration award should be affirmed with leave to counsel to

submit an affidavit of services for legal services rendered in this Court.

Dated: New York, New York
January 17, 1977

Respectfully submitted,

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Of Counsel:
Robert Silagi

Appendix

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL NO. 964, UNITED BROTHERHOOD OF CARPENTERS and JOINERS AMERICA, AFL-CIO,	:	76 Civ. 1899 (GLG)
Plaintiff,	:	
-against-	:	MEMORANDUM
N.J. NESMITH CONSTRUCTION CO., a New Jersey Corporation, also known as N.J. NESMITH,	:	OPINION
Defendant.	:	45035

APPEARANCES:

GUAZZO, SILAGI, CRANER & PERELSON, P.C.
Attorneys for Plaintiff
888 Seventh Avenue
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By: Robert Silagi, Esq.
Of Counsel

EMANUEL GERSTEN, ESQ.
Attorney for Defendant
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G O E T T E L , D. J.

This is an action seeking to confirm an arbitration award, rendered against the defendant, pursuant to 9 U.S.C. §9. The defendant opposes its confirmation because of the alleged lack of an agreement to arbitrate and alleged improprieties in the conduct of the arbitration hearing. Plaintiff now moves for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

On October 20, 1975, the plaintiff served a notice of intention to arbitrate, in accordance with a provision of their labor contract, upon the defendant in accordance with the appropriate state procedural requirements.[1/]

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1 It was the undisputed conclusion of the Arbitrator that plaintiff's notice complied with the statutory prescriptions. For purposes of this motion, therefore, it may be assumed (although it is not necessary to this Court's conclusion) that this notice contained a statement expressly advising the defendant that he had twenty days within which to move for a stay or he would be precluded from thereafter raising the defense of a lack of a valid agreement in accordance with §7503(c).

See C.P.L.R. §7503. The defendant failed to avail itself of the statutorily provided opportunity to move within twenty days for a stay of the arbitration proceeding based upon its claim that "a valid agreement was not made or has not been complied with . . . ." Id. [in pertinent part].[2/] Subsequently Max J. Miller, Esq., was appointed Arbitrator by the New York State Mediation Board. On February 5, 1976, a hearing was conducted by the Arbitrator at which evidence was submitted by both sides. On February 9, 1976, an award in favor of the plaintiff was rendered by the Arbitrator together with an opinion in which the defense of the lack of an existing contract to arbitrate was characterized as a "sham." Plaintiff's subsequent request for compliance with the terms of the award was refused and this action to confirm the award was initiated.

It is settled in New York, if not universally,

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2 In its Memorandum of Law in opposition to this motion, the defendant also suggests a possible defense based on the statute of limitations. Such a defense similarly must be presented as a basis for a request for a stay of arbitration made within twenty days from service of the notice of intention to arbitrate.

that "[a]rbitration presupposes the existence of a contract to arbitrate." Finsilver, Still & Moss v. Goldberg, M. & Co., 253 N.Y. 382, 389 (1930)(Cardozo, C.J.). Accord, Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467, 471 (1942). However, the New York statutory scheme imposes a time limitation within which the initial objection to the validity of a contract containing an arbitration clause must be raised. Section 7503(c) of the Civil Practice Law and Rules of New York specifically provides [in pertinent part] that:

> "An application to stay arbitration must be made by the party served [with notice of intention to arbitrate] within twenty days after service upon him of the notice or demand, or he shall be . . . precluded ['from objecting that a valid agreement was not made or has not been complied with . . .']." 3/

The New York courts have consistently upheld the validity of this proviso which is similar to 9 U.S.C. §4. See,

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3 The time limitation in New York within which to apply for a stay was originally set at ten days, but in 1973 it was amended to twenty days by the legislature.

e.g., Matter of Hesslein & Co. v. Greenfield, 281 N.Y. 26, 31 (1939); Finsilver, Still & Moss v. Goldberg, supra at 391-92; Housekeeper v. I[illegible]ie, 333 N.Y.S. 2d 932, 936 (4th Dep. 1972), appeal dismissed, 345 N.Y.S. 2d 1018 (1973); Matter of Mell, 315 N.Y.S. 2d 708, 710 (3d Dep. 1970); Bauer v. MVAIC, 287 N.Y.S. 2d 206, 211-12 (1968), rev'd on other grounds, 296 N.Y.S. 2d 675 (1969); Langemyr v. Campbell, 261 N.Y.S. 2d 500, 502-03 (1965). But see Matter of Ledo Realty Corp. v. Continental Casualty Co., 43 Misc. 2d 380, 251 N.Y.S. 2d 99 (Schen Cty. 1964). See generally C.P.L.R. §7503(c), Supp. Com. P. 206 (time limit to be construed as a statute of limitations).[4/]

The only defense alleged by the defendant with any specificity in response to the instant motion is his

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4 The defendant did not even attempt to stay the arbitration hearing so the troublesome question of computing the "twenty-day" period is not an issue here. See, e.g., Knickerbocker Insurance Co. v. Gilbert, 28 N.Y. 2d 57, 320 N.Y.S. 2d 12 (1971).

same argument which was rejected at the arbitration hearing -- i.e., that no valid contract to arbitrate existed. It is clear, however, that the defendant is now precluded from attacking the contract on the basis that it is void. See Reeves v. Tarvizian, 351 F.2d 889, 891 (1st Cir. 1965); Boston and Maine Corp. v. Illinois Central Railroad Corp., 274 F. Supp. 257, 260 (S.D.N.Y.), aff'd,396 F.2d 425 (2d Cir. 1968). See also Lerma v. Allstate Insurance Company, 301 F. Supp. 361, 363-64 (N.D. Ind. 1968); Bernhardt v. Polygraphic Co. of America, 122 F.Supp. 733, 734 (D. Vt. 1954), rev'd, 218 F.2d 948 (2d Cir. 1955), aff'd, 350 U.S. 198 (1956).

From a reading of the pleadings and legal memoranda submitted by the defendant it may be gleaned that it is arguing secondarily that the hearing was not conducted in a legal and proper manner. Although the Federal arbitration statute provides that an award may be vacated where there is proof of certain improprieties and illegalities, the general allegations proffered by the defendant are insufficient here.

See 9 U.S.C.A. §10(a-d). In that the movant has adequately supported his motion for summary judgment, the defendant cannot rely on pleadings that are merely conclusionary and totally lacking in specificity. Cf. Petroleo Brasileiro, S.A., Petro v. Ameropan Oil Corp., 372 F.Supp. 503, 506-07 (E.D.N.Y. 1974); Beckman v. Walter Kidde & Company, 316 F. Supp. 1321, 1324-25 (E.D.N.Y. 1970), aff'd, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972). See Stevens v. Barnard, 512 F.2d 876, 878 (10th Cir. 1975); Loveable Company & Honeywell Inc., 431 F.2d 668, 670-71 (5th Cir. 1970); Briggs v. Kerrigan, 431 F.2d 967, 968 (1st Cir. 1970); United States v. Tinghino, 396 F.Supp. 743, 745-46 (E.D.N.Y. 1975).

Moreover, the defendant's papers in response to the motion for summary judgment are fatally defective procedurally in that they completely fail to comply with Local Rule 9(g) which requires a statement from the party opposing such a motion listing the material facts to which he contends there exists a genuine issue. At oral argument

on the motion this defect was brought to the attention of defense counsel by the Court, but the defendant has never attempted to cure it. Consequently, the Rule 9(g) statement submitted by the plaintiff-movant should be accepted as true since it has not been controverted.[5/] Even construing these responses of the defendant with an eye toward doing substantial justice, see Fed. R. Civ. P. Rule 8(f), 28 U.S.C.A., this Court arrives at the same conclusion.

While we are mindful of the Second Circuit's many expressions of disfavor against the granting of summary judgment motions, e.g., Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975), Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975), to allow actions

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5 Rule 9(g) provides in pertinent part:

> "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

to confirm arbitration awards to be stymied by attempts to relitigate threshold issues required to be raised before arbitration, or by vague generalizations concerning the propriety of the arbitration, would be to emasculate 9 U.S.C. §9.

Plaintiff's counsel contends that he is entitled to his legal fees for seeking confirmation of the award from the defendant, but he fails to attach that section of the contract upon which he relies for this relief. (The legal fees of $450 for the arbitration are included in the award itself.) Moreover, the rate of $100 per hour requested by the plaintiff's attorney is excessive contrasted to the arbitration award fee. It would, in any event, require an evidentiary hearing to determine its reasonableness. Summary judgment is granted confirming the arbitration award, without prejudice to a subsequent application for the attorneys' fees incurred in bringing this action.

SO ORDERED:

Dated: New York, N.Y.,
September 1, 1976.

Gerard L. Goettel
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LOCAL NO. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Plaintiff,

-against-

N.J. NESMITH CONSTRUCTION CO., a New Jersey Corporation, also known as N.J. NESMITH,

Defendant.

----------X

76 Civ. 1899
G.L.G.

JUDGMENT
#76,891

The above entitled cause, seeking to confirm an arbitrator's award pursuant to 9 U.S.C. § 9, came before the Court on plaintiff's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Robert Silagi, Esq., of Guazzo, Silagi, Craner & Perelson, P.C., appeared on behalf of the plaintiff, and Emanuel Gersten, Esq. appeared on behalf of the defendant before me on the 3rd day of June, 1976.

The facts necessary to the determination of this motion appear to be the following: On the complaint dated April 26, 1976 with the exhibits annexed thereto, including the award of the arbitrator Max J. Miller dated and acknowledged February 9, 1976, the affirmation of Robert Silagi, Esq. and statement pursuant to Rule 9(g) of the General Rules dated May 20, 1976, the reply affirmation of Robert Silagi, Esq. dated June 1, 1976, all in support of said motion, and on the answer, dated May 10, 1976, third party

complaint, the affidavit of N. Richard Nesmith sworn to on May 10, 1976 and the affidavit of Norman J. Nesmith sworn to on May 27, 1976, all in opposition to said motion, it is established that there is no genuine issue as to any material fact, the defendants have no defense and that the plaintiff is entitled to judgment as a matter of law; and there being no just reason for delay of entry of this judgment pursuant to Rule 54(b), of the Federal Rules of Civil Procedure, it is

ORDERED, ADJUDGED and DECREED that the arbitrator's decision and award herein be confirmed in all respects; and it is further

ORDERED, ADJUDGED and DECREED that the defendant pay to the plaintiff the sum of $344.66 to be applied as follows: $199.54 for wages due to Nevio Perentin and $145.12 for wages due to Stephen Smolley; and it is further

ORDERED, ADJUDGED and DECREED that the defendant pay to the plaintiff the sum of $3,941.03 for distribution to members of plaintiff in accordance with the terms of paragraph 3 of the aforesaid arbitrator's award; and it is further

ORDERED, ADJUDGED and DECREED that defendant pay the sum of $2,144.67 to Carpenters Local 964 Fringe Benefits Funds; and it is further

ORDERED, ADJUDGED and DECREED that to each of the foregoing sums mentioned there shall be added interest at the rate of six percent (6%) from the date(s) on which such payments should have been made pursuant to the terms of the labor contract with the plaintiff; and it is further

ORDERED, ADJUDGED and DECREED that defendant shall pay to Robert Silagi, Esq., attorney for plaintiff, the sum of $450 as and for reasonable legal fees incurred in the arbitration, and it is further

ORDERED, ADJUDGED and DECREED that defendant shall pay to Max J. Miller, the arbitrator, the sum of $756.12 as and for the arbitrator's fee and expenses incurred in the arbitration; and it is further

ORDERED, ADJUDGED and DECREED that defendant shall pay to Robert Silagi, Esq., attorney for plaintiff, the sum of $693.08 as and for reasonable fees incurred in the instant action; and it is further

ORDERED, ADJUDGED and DECREED that plaintiff, Local No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, shall have judgment against defendant, N. J. NESMITH CONSTRUCTION COMPANY, in the aggregate sum of $ 8,329.56 together with interest of $291.06, and the costs of this action to be taxed.

Dated: New York, New York
September 29, 1976

Gerard L. Goettel
U.S.D.J.

JUDGMENT ENTERED - 9/30/76
Raymond F. Burghardt
CLERK

A TRUE COPY
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NEW YORK STATE MEDIATION BOARD

In the Matter of the Arbitration	
-between-	
LOCAL UNION NO. 964, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO,	NOTICE OF INTENTION TO ARBITRATE
Union,	
-and-	
N. J. NESMITH	
Employer.	

PLEASE TAKE NOTICE, that the Union, whose address is 130 North Main Street, New City, New York 10956, pursuant to an agreement with the Employer to arbitrate certain differences, hereby demands arbitration of the following dispute:

Did the Employer violate the collective bargaining agreement between the parties dated July 1, 1974?

1. By failing to employ members of the unit in violation of Section 1 - Jurisdiction and Section 20 - Union Security, at its job at West Nyack, New York.

2. By failing to pay wages to members of the unit in accordance with Section 5 - Minimum Wages.

3. By failing to comply with Section 9 - Welfare Fund; Section 10 - Pension Fund; Section 11- Vacation Fund; Section 12 - Supplementary Unemployment Benefits; Section 17 - Carpenters Apprenticeship Fund and Journeymen Retraining Fund, in that it did not make the appropriate payments into said fringe benefit funds on behalf of members of the unit.

The Union demands the following relief:

A. An audit of all payroll books and records of the Employer to verify the contributions due under Sections 9, 10, 11, 12, and 17 of the contract.

B. The payment of proper wages to members of the unit.

C. The payment of proper contributions to the fringe benefit funds.

D. Injunctive relief to make the Employer cease and desist from all similar future violations of the contract.

E. The payment of counsel fees and the costs of this arbitration.

PLEASE TAKE FURTHER NOTICE, that pursuant to the provisions of CPLR 7503(c), unless you apply to stay the arbitration within twenty days after service of this Notice, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with, and from asserting in court the bar of a limitation of time.

Dated: New York, New York
October 20, 1975

GUAZZO, SILAGI, CRANER & PERELSON, P.C.

By: _____

Attorneys for the Union
888 Seventh Avenue
New York, New York 10019
(212) 757-7100

TO: N.J. NESMITH
1375 Route 23
Butler, New Jersey 07405
Certified R.R.R.
No. 440150

CC: Local Union No. 964

also be cause for immediate dismissal, provided the above is applied uniformly to all personnel including management.

SECTION 22 — JURISDICTIONAL DISPUTES

The parties hereto accept, without reservation, the Impartial Jurisdiction Disputes Board for the settlement of jurisdictional disputes, and agree to adhere strictly to the procedures and rules as adopted by the Board in the settlement of any dispute arising over the jurisdiction of work. The contractors and the Union accept their respective responsibilities as outlined by the Board, and will comply with all Board decisions.

SECTION 23 — EQUAL TREATMENT PROVISION

The Union agrees that it will treat all contractors equally, and will not discriminate in favor of, or against, any employer.

SECTION 24 — GRIEVANCES, DISPUTES AND ARBITRATION

A. Should any dispute arise between the parties hereto regarding the interpretation, or application, of this agreement, or any clause or provision or portion thereof, the parties agree to make an earnest effort to adjust, resolve and settle such dispute. Should the parties be unable to settle the matter, the dispute shall be submitted to arbitration as set forth in paragraph B hereof within thirty (30) days after the dispute has arisen, or the occurrence of the grievance.

B. The party desiring arbitration shall notify the other in writing and shall notify the New York State Board of Mediation, in writing, setting forth the issues involved, and the specific section of the agreement covering same. The New York State Board of Mediation shall designate the arbitrator from its panel of arbitrators, whose decision shall be made in writing, and shall be final and binding upon both parties to the controversy. The arbitrator is not empowered to change or modify, in any manner whatsoever, any of the terms, conditions or provisions of this agreement. Costs of the arbitration including arbitrator, accounting, legal and court fees shall be paid by the party losing said arbitration, unless otherwise mutually agreed to by the parties. If there is a question as to the "loser," the decision of the arbitrator shall be binding.

C. So long as the contractor is not in default in complying with the decision of the arbitrator, the Union may not engage in any strike, picketing, boycott or walkout, except as expressly authorized to do so elsewhere in this agreement. So long as the Union is not in default in complying with the decision of the arbitrator, the contractor may not engage in any lockout.

D. In addition to any other method authorized by law, any paper, process or notice may be served upon a party by certified mail, return receipt requested, at the address set forth in this agreement for said party. A Post Office receipt shall be conclusive evidence of proper service.

E. An arbitrator's award made hereunder, may be confirmed in any court of appropriate jurisdiction in the State of New York or in any state where a party does business or has its principal office.

EXHIBIT A

Union Ck #2
2-5-76 mfm

CARPENTERS' WELFARE, PENSION AND S. U. B. FUNDS

Local #964 . 130 North Main St., New City, New York 10956 (914) 634-8959

This statement must be received at the office of the Fund, not later than seven (7) days after your payroll period ends.

EMPLOYER'S Name N. J. Nesmith, Inc. .....for Period ending June 6, 1975.....

Address 1375 Route 23 - Butler, N. J. 07405 Signature Edward Nesmith

Telephone # 838-1589 .....Title President...Date Prepared 7/7/75.

Name of Project Shell Service Station

Employee's Social Security Account #	Full name of Employee (type or print)	Local Union	No. of Hours worked
1. 109-32-2311	Nevio A. Perentin	#964	35 Hrs. wk. ending 5/7/75
2. 077-22-9582	Stepen Smolley	#964	35 Hrs. wk.ending 5/7/75
3.			
4. 109-32-2311	Nevio A. Perentin	#964	21 hrs. wk.ending 5/14
5. 077-22-9582	Stephen Smolley	#964	14 hrs. wk.ending 5/14
6.			
7. 109-32-2311	Nevio A. Perentin	#964	26 hrs. wk. ending 5/21
8.			
9. 109-32-2311	Nevio A. Perentin	#964	21 hrs. wk. ending 5/28
10.			
11. 109-32-2311	Nevio A. Perentin	#964	42 hrs. wk. ending 6/4/75
12. 077-22-9582	Stephen Smolley	#964	37 Hrs. wk. ending 6/4/75
13.			
14.			
15.			
16.			
17.			
		TOTAL HOURS	231 Hours

"By making this report the above named company herewith agrees and acknowledges that it is bound by the Collective Bargaining Agreement in effect between the parties and all the trust agreements so in effect with respect to any fringe benefits funds of Local #964. In addition it agrees to be bound by the arbitration clause of the said Collective Bargaining Agreement."

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STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN ADAMS being duly sworn deposes and says: On January 20th, 1977 I served the within ~~record on appeal~~ brief-appendix on Emanuel Perlstein the attorney for the ~~respondent~~ defendant-appellant by ~~leaving~~ mailing three copies thereof at his office located at 21-23 Main Street Newton, New Jersey 07860

John Adams

Sworn to before me
this 20th day of
January, 1977

Rose Goldman

ROSE GOLDMAN
COMMISSIONER OF DEEDS
CITY OF NEW YORK 3-5-5
Certificate Filed in New York County
Commission Expires July 1, 1977